No. 337

In the Supreme Court of the United States

OCTOBER TERM, 1944

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, LOCALS NOS. 15, 17, 107, 108, AND 111, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, PETITIONERS

v.

EAGLE-PICHER MINING AND SMELTING COMPANY, A CORPORATION, AND EAGLE-PICHER LEAD COMPANY, A CORPORATION, AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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CITATIONS

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OPINIONS BELOW

The opinion of the court below denying the motion of the National Labor Relations Board for judgment on its petition to vacate portions of the decree and to remand (R. 307–311) is reported in 141 F. (2d) 843. The court's memorandum opin-

ion granting permission to the Board to file the petition (R. 281) is not reported; its order denying petitioners' motion to modify the decree or to remand (R. 343) was entered without opinion. The court's opinion enforcing the Board's order is reported in 119 F. (2d) 903. The findings of fact, conclusions of law, and order of the Board (R. 25–180) are reported in 16 N. L. R. B. 727–882.

JURISDICTION

The order denying the Board's motion for judgment on its petition to remand and dismissing the petition (R. 311–312) was entered by the court below on April 19, 1944. The Board's petition for rehearing was denied May 17, 1944 (R. 343). The order denying petitioners' motion to modify the decree or remand was entered by the court below on May 17, 1944 (R. 343). The petition for a writ of certiorari was filed on August 11, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Sections 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals, having entered a decree enforcing an order of the National Labor Relations Board, may foreclose reconsideration by the Board of the appropriateness of its back-pay award and make an independent

judicial determination that such administrative reconsideration is unnecessary.

2. If the Circuit Court of Appeals does have the power to foreclose administrative reconsideration of the remedy prescribed, whether it abused this power by refusing a remand to the Labor Board in view of an undenied claim that the Board committed a verbal error in prescribing the back-pay award which, in the light of newly-discovered evidence as to the availability of employment during the period both prior and subsequent to the Board's order inevitably results in a substantial distortion of the back-pay remedy.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, pp. 26–29, *infra*.

STATEMENT

In proceedings instituted upon charges filed by the petitioners, International Union of Mine, Mill & Smelter Workers, Locals Nos. 15, 17, 107, 108, and 111, hereinafter called the Unions, the Board decided that the Eagle-Picher Mining and Smelting Company and the Eagle-Picher Lead Company, hereinafter called the Companies, had committed unfair labor practices in violation of Sections 8 (1) and (3) of the Act (R. 25–166), and entered an order, on October 27, 1939, requiring them to cease and desist from their unfair labor practices and to take certain affirmative

action, including the reinstatement of 209 employees with back pay to be computed according to a formula set forth in the Board's decision (R. 166–180). On June 27, 1941, on petition of the Companies for review and request of the Board for enforcement in which the Unions joined as interveners (R. 182–185), the court below entered a decree enforcing the Board's order, with modifications not here material (R. 208–212). On August 23, 1941, the Companies offered reinstatement to the 209 employees (R. 224, 287). On or about May 1, 1942, the Companies tendered the sum of $8,409.39 as full payment of all the back pay due under the decree (R. 224–225, 287–288). Subsequently the Companies withdrew their tender of $8,409.39 and offered $5,400 as the full amount due and owing (R. 225). Thereupon, the Board, in accordance with its usual compliance procedures, examined the payrolls and records of the Companies to verify the accuracy of the Companies' computations and to ascertain whether the affirmative provisions of the order had been fully executed (R. 225–226, 287). During the course of its compliance investigation, the Board became convinced that the provisions of its order respecting back pay contained certain errors and mistakes, and that in framing such provisions, it had misconceived the facts respecting the availability of employment with the Companies, both prior to and since the hearing, for the 209 employees (R. 217).

The Board and the Unions, therefore, each filed petitions in the court below requesting a remand to the Board of so much of the proceedings as was necessary to permit the Board to reconsider its back-pay remedy (R. 215–280, 329–342). The facts upon which the petitions to remand were based are as follows:

On May 8, 1935, a strike caused mines, mills, and smelters operated by the Companies to be closed down for a period of several weeks (R. 39–40). At the hearing held before a trial examiner of the Board, evidence was introduced indicating that upon resumption of operations on or about June 12, 1935, the Companies discriminatorily refused to rehire the 209 employees, hereinafter called the claimants (R. 45, 74–99, 130–131, 172–176). Defending against the charge of discrimination and the prospective remedy of reinstatement and back pay, the Companies introduced evidence to show that the number of workers they employed was drastically curtailed after July 5, 1935, the effective date of the Act. They showed that after operations were resumed, mines were sold, operations at other mines were suspended, and that a reorganization of production methods resulted in reduction in the size of crews, the abolition of specific jobs and, in general, a need for fewer employees (R. 10–18, 185–186). They also showed that in restaffing after the strike, they quickly eliminated new employees as former employees applied (R. 17–18), and that over ninety

percent of those working after the strike had been regular employees before the strike (R. 9). The Trial Examiner recommended reinstatement of some of the claimants with back pay (R. 30). The Companies excepted to these recommendations, stating that as to each such claimant the recommendation "ignores * * * that there is no evidence that said person's former employment or any employment with the respondent or either of them was available on and after July 5, 1935"; that such claimant's former employment had "disappeared due to a change of operations" and was no longer available; and, further, that such recommendation "ignores the evidence of respondents' requirements and availability of work * * *" (R. 18–21, 219).

The Board found that, although as the Companies had urged, there had been a contraction of operations after the strike, the claimants had, on July 5, 1935, and at all times thereafter, been discriminatorily excluded as a class from such jobs as were available (R. 98–99, 101, 132, 166). The Board determined that the claimants should be reinstated (R. 131). It pointed out in its decision that in such situations it ordinarily required the employer to make whole each employee by giving him back pay for the period of discrimination based on his previous wages (R. 132), but that it would depart from that remedy in this case because it found that the number of jobs available for all employees after July 5, 1935, was and

would be insufficient to take care of all claimants and other old employees who applied for work (R. 98, 132–133, 134, n. 186). Since all the employees were equally qualified for most positions, and no special skill or abilities ordinarily were necessary, the Board assumed that the claimants, upon resumption of operations and in the absence of discrimination would have shared in employment opportunities proportionately with the other old employees who applied for work, hereinafter called reapplicants (R. 100, 101, 102, 132). However, the Board was not able to determine which specific claimants normally would have been rehired (R. 132–133). Turning "to the only solution that seems fair, workable, and calculated to serve the purposes for which it is intended," the Board directed that reimbursement to the claimants be effectuated pursuant to a special arithmetical formula which it thereupon devised (R. 133).

In substance the formula provides as follows: The amount of "all wages" paid by the Companies "to all persons hired or reinstated" from and after July 5, 1935, until the date of compliance by the Companies with the reinstatement provisions of the Board's order should be computed as a lump sum (R. 133). Since the Board could not assume that the claimants alone would have received the available jobs had the Companies acted lawfully, the Board directed that only a propor-

tionate amount of the wages constituting such lump sum should be allocated to the claimants (R. 133–134). This proportion was based upon the ratio which the claimants bore to the total number of pre-strike employees seeking their jobs back after July 5, 1935. As the method of arriving at this proportion, the Board specified that a fraction be constructed which should have for its numerator the number of claimants, and for its denominator the number of claimants plus reapplicants (R. 134). The Board directed that so much of the lump sum as was embraced by this fraction be apportioned among the claimants, after deducting from the distributive share of each the sum of his net earnings elsewhere (R. 134). Illustrating its purpose, the Board gave a hypothetical example wherein the lump sum amounted to $360,000, and there were 200 claimants and 100 reapplicants. Since presumably "two-thirds of the number of jobs would have gone to claimants discriminated against, had the respondents acted lawfully * * * two-thirds of the lump sum, or $240,000, would be the basic sum to be divided among the claimants discriminated against" (R. 134).

Neither the Board's order nor the court decree enforcing it fixed the amount of back pay in dollars and cents but left the determination of the exact sum to be made after the claim period would be closed by reinstatement of the employees.[1]

[1] This is in accordance with the Board's established practice, in cases in which reinstatement must be made after the

Here the hearing closed April 28, 1939 (R. 27) and the period for which back pay was due under the Board's order and the court decree enforcing it did not close until August 23, 1941, when the period of discrimination was terminated by the Companies' offer of reinstatement to the 209 employees (R. 224, 287). In its investigation and analysis of the Companies' records begun immediately after the Companies' tender on or about May 1, 1942 [footnote] (see p. 4, *supra*), and completed in October 1942, the Board discovered that the Companies, at virtually all times after July 5, 1935, had been steadily employing new employees (in addition to reapplicants) in numbers equal to and at times in excess of the total number of claimants and reapplicants, and at virtually all times had been fully able to employ all claimants and all reapplicants (R. 224–226, 268–280, 287, 294–296, 301–302, 305–306). The Board, therefore, concluded that it had been misled by the Companies' evidence and contentions that at no time after the strike had jobs been available for the full number of claimants and reapplicants (R. 216–223). It decided that because of its misconception arising from the Companies' misrepresentations, it had never considered what would

close of the hearing, of not taking any evidence at the initial hearing respecting the actual amount of back pay due. One of the reasons for this practice is that such evidence, under the circumstances, could not be complete. See National Labor Relations Board, *Fifth Annual Report* (Gov't Printing Office, 1940), p. 128.

be the appropriate remedy, and its prior back pay order had been "grossly unsuited to the situation which has now been discovered actually to have existed prior to and since the hearing" (R. 217). It therefore filed a petition in the court below stating the foregoing facts and requesting the court to enter appropriate orders to permit the Board to reconsider the back-pay provisions of its remedy (R. 213–230). The Board stated that in the event of such a remand, "the Board will for the first time be in a position to consider and, pursuant to its statutory duty, will consider the actual facts in order to prescribe a remedy appropriate to the true conditions. The Board can then correct the gross inequity now discovered and adequately provide for the effectuation of the purposes of the Act and the protection of the public interest" (R. 229).

It was also discovered during the compliance investigation that the formula, which the Board devised because of its findings respecting curtailed employment opportunities, contained an obvious mistake which, while entirely harmless in the employment situation then understood to exist by the Board, served to reduce back pay, in the light of the facts subsequently disclosed, to but a small fraction of the intended sum.[2] The Board asked

[2] While a dispute exists between the parties as to how much back pay is due, assuming the Board's decision must be applied without correcting the mistake, there can be no doubt that the mistake reduces the back pay to less than one-fourth

the court below to remand on the basis of the inapplicability of the formula as a whole, which included the footnote in which the mistake occurred, but the mistake was specifically called to the court's attention by the Unions, the petitioners here (R. 336). The Board admits that the formula contains the mistake which the Unions set forth in their petition (pp. 10, 20–21) and further admits that such mistake renders the formula wholly inaccurate as a measure for back pay. This mistake appears in footnote 185 which provides (R. 133):

> If at any given time during this period [of discrimination] the number of such new or reinstated employees then working exceeds the number of claimants discriminated against, only the earnings of a number of such employees equal to the number of claimants discriminated against shall be counted in computing the lump sum.

Correctly worded so as to achieve the Board's stated objective, footnote 185 should read:

> If at any given time during this period the number of such new or reinstated em-

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of the amount which the claimants would have received under the Board's usual back-pay remedy. According to the Board's calculations, based upon its investigations, the 209 claimants, under the Board's normal remedy of full back pay, would receive approximately $800,000 in reimbursement for the net loss which they had sustained, after allowance for interim earnings elsewhere (R. 227–228). Apportionment among the 209 claimants of the sum of $5,400, which the Companies claim is all that they are required to pay under

ployees then working exceeds the number of claimants discriminated against *plus the number of old employees reapplying*, only the earnings of a number of such employees equal to the number of claimants discriminated against *plus the number of old employees reapplying* shall be counted in computing the lump sum.

The omission of the italicized words from the footnote causes the back-pay award to depart from the Board's expressed intention to make the claimants whole to the extent that employment opportunities for claimants and reapplicants would have permitted their employment absent the discrimination. Instead of limiting the back pay provided for the claimants to the full amount of their loss, it so limited the lump sum of which the claimants receive only a fractional share. Consequently the claimants, even where full employment would have been available, were limited to a small portion of their loss in wages.[3]

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the back-pay provisions of the Board's order, would afford the claimants recompense for less than three-fourths of one percent (.0075) of the loss which the Companies wilfully caused them during its six-year period of refusal to comply with the Act (R. 228). The Board's computations of the amount which would be due if the mistake remains uncorrected, while not yet complete because of the prolixity of the elements involved and the time-consuming process which the mistake imposes, nevertheless indicate that the claimants will lose more than 75 percent of the amount which they would have earned had the Companies acted lawfully.

[3] The formula likewise illogically requires that in determining the net amount of back pay due, there be deducted from the pro rata gross share of each claimant as computed under

On November 16, 1943, on the record and on the admissions contained in the Companies' answer to the Board's petition, the Board moved that the Circuit Court of Appeals enter a judgment permitting the Board to reconsider its remedy as requested in its petition (R. 293–304). On April 19, 1944, the court handed down its opinion denying the Board's motion and dismissing its petition (R. 307–312). The court treated the petition as "in the nature of a bill to review to set aside, for fraud, mistake and newly discovered evidence" the back-pay provisions of the prior decree entered by the court in enforcing the Board's order (R. 307). It stated that it was

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the formula, the full amount of such claimant's net interim earnings (R. 135), whereas the theory upon which the formula was devised would warrant deduction only of a pro rata share of his net interim earnings. The formula is based on the assumption that, even though there had been no discrimination in rehiring, not all of the claimants would have been rehired, and because it was impossible to determine which would have been rehired, the formula provides that each should get a pro rata share of the amount of wages which would have gone to those who would have been reemployed. On the same assumption, the Companies should be entitled only to credit for the earnings of those who would have been rehired, and since it is impossible to determine those individuals, the amount of net earnings to be deducted should be prorated on the same basis. Failure to provide for such a prorating of the earnings to be deducted means that while only part of the claimants are treated as having worked for the Companies insofar as their recovery of wages is concerned, they are all assumed to have been working when it comes to reducing the liability of the Companies for making them whole.

"not persuaded that the Board departed from the form of order by which it 'ordinarily ordered the offending employer to make them [discriminatorily discharged employees] whole with back pay' in the present instance because of an understanding or determination by the Board as to the number of men the company was employing, or as to the number of jobs brought into existence by such employment or as [to] the composition of the staff of workmen" (R. 309). It therefore concluded that the back-pay provisions of the decree were not "obtained by misrepresentation or wrongful conduct of the Companies" (R. 310). The court also stated that it was not convinced "that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved" (R. 311). The Unions' request for modification of the decree or remand, and the Board's petition for rehearing were denied on May 17, 1944 (R. 343).

ARGUMENT

1. We agree with petitioners that the decision below conflicts in principle with the decision of the Circuit Court of Appeals for the Fourth Circuit in *American Chain & Cable Co.* v. *Federal Trade Commission*, 142 F. (2d) 909. After the latter court decreed enforcement of an order of the Federal Trade Commission (139 F. (2d) 622), the parties against whom the order was

directed petitioned the Commission to stay enforcement of its order until after the war. As additional relief they asked that the Commission join with them in a request for modification of the decree of enforcement. The Commission denied the motion, taking the position that neither the Commission nor the court had power to stay enforcement of the order at that stage of the proceedings. A writ of mandamus was then sought to compel the Commission to consider and decide petitioners' motion on its merits. The court granted the application so as to require the Commission to "exercise the administrative power delegated to it by Congress" (142 F. (2d) 909, 912). The court noted that "the necessity for modification may be just as urgent in the case of an order which has been affirmed and ordered enforced by the Circuit Court of Appeals as in the case of one which" has not been subject to judicial review (p. 911). It held that the power of a circuit court of appeals over administrative remedial orders "is appellate and revisory merely," and does not include any power to grant or withhold remedial relief after enforcement, a power "essentially administrative in character" (p. 911 and note).[1] It held, further, that the court had no power to modify the decree where the Commission

[1] The Circuit Court of Appeals for the Fourth Circuit, in denying a stay of its decree enforcing an order of the Federal Trade Commission in an earlier case, stated that the determination of whether a stay should be granted "is more prop-

had not itself modified its order, "since the decree is based on the order, not on the conditions which called it forth" and stated that "to hold otherwise, would be to clothe the Circuit Courts of Appeals with the administrative powers of the Commission in cases in which they have entered decrees of enforcement" (p. 913). The court observed that "there is no danger that the decree of the court may be flouted by such modification", for "any action taken by the Commission would then be subject to review by the Court, as in the case of other orders * * *" (pp. 912, 913). The portions of Section 5 (b) of the Federal Trade Commission Act, 38 Stat. 717, 720, as amended (15 U. S. C. 45 (b)), which the Fourth Circuit Court of Appeals construed in making its decision, served as a model for Section 10 (c) of the National Labor Relations Act.[5]

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erly within the province of the Commission rather than the courts. We are of the opinion that we have no power to order any delay in the putting into effect of a lawful order of the Commission." *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F. (2d) 429, 432.

[5] Section 10 (d) of the National Labor Relations Act (*infra*, p. 26) was copied almost verbatim from Section 5 (b) of the original Federal Trade Commission Act. While Section 5 (b) was slightly altered in form by the 1938 Amendments to the Federal Trade Commission Act, there is nothing in the wording of the changes or the legislative history thereof which shows any intention to alter its meaning insofar as the instant question is concerned. A comparative analysis of the wording of Section 5 (b) before and after the amendments appears in H. Rep. No. 1613, 75th Cong., 1st Sess., p. 15.

While we do not entirely agree with the ruling in the *American Chain and Cable* case, we believe it is correct insofar as it denies the power of the circuit courts of appeals, after enforcement of an administrative order, to foreclose administrative reconsideration of the appropriate remedy. The court below affirmed its power to permit a modification of the order (R. 311), and the provision in Sections 10 (e) and (f) of the National Labor Relations Act making the decree of the circuit court of appeals final, subject to appropriate review by this Court, cannot mean that no tribunal has the power to rectify mistakes (*Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. (2d) 182 (C. C. A. 2)) or to adjust the provisions of the decree where changed circumstances require such adjustment (see pp. 20–21, *infra*). Given such a power, we believe that the necessities of proper administration require that that power, in the first instance, be exercised by the administrative agency. "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194.

The remedying of unfair labor practices is not within the province of a judicial tribunal which is neither endowed with the requisite background of

special experience nor intended by Congress to deal with such matters. Thus, in substituting its judgment for that of the Board, and in making a judicial determination that the mistakes made by the Board did not result in "unfair administration of the Act" (R. 310), the court below did not advert to any of the factors which the Board would weigh in determining whether the administration of the Act required that the Board's mistakes be corrected. The Board would judge the issue not in terms of righting a private wrong, but in terms of the extent to which the effect of the employer's economic recrimination has been neutralized and the employees assured of their rights under the National Labor Relations Act. In this case, it is not only individual workmen who suffer from a failure to rectify the Board's error; the public interest sustains as injury which is inevitably more far reaching and more lasting; the Government, in its protective role, has been proved impotent. Employers who have already shown a disposition to discriminate against employees for union activities can now convey hints, suggestions, and outright threats with great persuasiveness, for the remedial processes provided by law have come to naught. This case, with its tale of company-induced intimidation, terror and violence noted by the Board in its decision (R. 41–42, 44–48, 55–63), and its demon-

stration of company willingness to withhold employment from the claimants for six years, is an impressive instance of the unfortunate ultimate effect where Government intervenes and fails to protect. The Board sought an opportunity to reappraise and act anew.

If in the Board's judgment further hearings and consideration are necessary to discharge its duty, the courts should not be permitted to gainsay that judgment. It is true that under the decision of this Court in *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 370, the Board does not have an absolute right to reconsider its order while its enforcement proceeding is pending before the circuit court of appeals. But this decision was not a denial of the special competence of the administrative agency to deal with its remedial orders; it was merely a necessary adjustment to allow the court to dispose of the case before it without the intrusion, at the same time, of another tribunal. The *Ford* ruling does not foreclose modification after the court's functions have been completed. Thus in *American Chain & Cable Co.* v. *Federal Trade Commission*, 142 F. (2d) 909, 912, the Fourth Circuit Court of Appeals stated that the purpose of the statutory provision allowing modification by the Commission "if no such petition" for review has been filed was "to suspend the power of the Commission to modify its orders while petitions for review there-

of are pending in the Circuit Courts of Appeals, so as to avoid conflicts of jurisdictions; but, after a Circuit Court of Appeals has acted upon a petition for review, there is no reason why the Commission should not modify its order, if modification is warranted by the changed conditions contemplated by the statute." Then too, even while the transcript of the record is pending before the court on review of a Labor Board order, under the provisions of Section 10 (e) of the Act, the court does not decide whether the order of the Board should be modified on a motion for leave to introduce new evidence which may result in a modification of the order, but is confined to a decision as to whether the additional evidence is material and whether there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board.

The Companies did not end their discrimination against the claimants until several months after entry of the decree for enforcement (R. 224, 287). The Board's order, providing back pay not merely for the period preceding its order but for the subsequent period, which would terminate only when the claimants were reinstated in compliance with the order (R. 132–135), necessarily looked to the future; its operation was in greater part prospective. Not only was the provision for computing back pay for the period prior to the order based on the finding that there were not enough jobs for all

claimants and reapplicants (R. 98–99, 101, 132), but the same method was provided for the period after the issuance of the order, simply in anticipation of a continuing insufficiency of available employment. However, subsequent to the close of the hearing, it appeared that there was in fact sufficient employment to provide jobs for all claimants and reapplicants at all times (R. 225, 268–280, 286–288, 305–306), so that the remedy as framed was rendered inapplicable because of the changed circumstances after entry of the decree. It has always been assumed that the Board could change its order in such an event. Cf. *Franks Bros.* v. *National Labor Relations Board*, 321 U. S. 702, 705; *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 83. Thus, insofar as the order of the Labor Board was a continuing order, the court did not have the power to foreclose administrative reconsideration of the appropriate remedy.

As this Court has said, "The Board is given no power of enforcement. Compliance is not obligatory until the court, on petition of the Board or any party aggrieved, shall have entered a decree enforcing the order as made, or as modified by the court." *In the Matter of the National Labor Relations Board*, 304 U. S. 486, 495. Thus ultimate judicial review, properly confined, would not have been foreclosed had the court remanded this case to the Labor Board.

2. If the Circuit Court of Appeals, however, does have the power to decide whether the Board should have an opportunity to exercise its judgment as to whether the back-pay order should be modified, it should properly have considered the factors that the Board would have considered on a remand (*supra*, pp. 18–19).* We believe that on a proper consideration of these factors, the court should have allowed the Board to reconsider the back-pay provisions of its order. The denial by

*The court erroneously considered other factors. Its statement that in decreeing enforcement of the Board's order "The Judges were not in agreement on the fundamental question whether the Board could make any compensatory award to the group of 209 employees at all under the circumstances established" (R. 310), is contrary to the opinion handed down at the time of the enforcement decree and furthermore seems wholly irrelevant to the issue of the Board's power to reconsider. All three judges sustained the back-pay provisions as to the group of 209 claimants generally but one judge believed that a small number of "striking employees who were not shown to have been willing to abandon the strike and to return to work prior to November 1, 1935" should have been excluded from both reinstatement and back pay, because "the absence of evidence to justify a finding that the loss of wages suffered by these members of the group was attributable to the unfair labor practice of petitioners" made the order penal (119 F. (2d) 903, 915). The majority sustained the Board's finding that the whole group of 209 employees were willing to return at all times after July 5, 1935, if the Companies would reemploy them without imposing the requirement that they join the company-sponsored union (119 F. (2d) at p. 914). Furthermore, the opinion of the court upon enforcing the order indicates that the court then assumed, as did the Board, that, because of curtailed employment, the sum to be apportioned was the wages lost

the court of this opportunity we believe to have been an abuse of its discretion. Although the Board devised the formula because it believed that full employment opportunities were not available, we concede that the formula, properly worded, might have operated fairly well in a situation in which full employment was available to all claimants and reapplicants (see opinion of the court below at R. 309). But the textual error in footnote 185 must necessarily cause application of the formula in such circumstances to distort the back-pay remedy (*supra*, pp. 11–12). And yet, when this error was called to the court's attention by petitioners, their motion to modify the decree or remand the case to the Board was denied without opinion (R. 343). The opinion of the court denying the Labor Board's petition for a remand might be read as suggesting that that relief is premature and must await computation of back pay under the terms of the decree as entered (R. 310). But since the result of such a computation, as we have shown, could not help but be totally inadequate, we submit that this litigation should not be further prolonged after the employees have waited

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by the group (119 F. (2d) at pp. 914–915), and did not understand that the apportionment was to be a mere fraction of the wages lost by the group, as the court now states it then ruled because of circumstances other than the availability of employment (R. 310).

[7] In addition to the mistake, the formula also contains ambiguities all of which the Companies have resolved in their favor in order to make their offer of only $5,400.

for more than nine years for an adequate remedy.[*] The role of the Companies in this case is not of such a character as to lead this Court to decide that the decree below should be accorded finality. The evidence of conscious misrepresentation on their part is persuasive, and under these circumstances, the court below should have permitted reconsideration by the Labor Board.

In addition, the decision of the court below, refusing to allow the Board to modify its order even insofar as it referred to the period subsequent to the Board's order, is in conflict with decisions of this and other courts holding that a subsequent material change of circumstances warrants modification of the decree where the latter has become inapplicable. *United States* v. *Swift & Co.*, 286 U. S. 106; *Corning Glass Works* v. *National Labor Relations Board*, 129 F. (2d) 967, 972 (C. C. A. 2); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 119 F. (2d) 1009, 1010 (C. C. A. 7); *Century Metalcraft Corp.* v. *Federal Trade Commission*, 112 F. (2d) 443, 447 (C. C. A. 7). And see *Franks Bros.* v. *National Labor Relations Board*, 321 U. S. 702, 705.

CONCLUSION

The petition for certiorari presents a question of importance in the field of administrative law

[*] A part of the delay in the proceedings is directly attributable to an injunction at the suit of the Companies restraining the Board from proceeding against them. *Eagle-Picher Lead Co.* v. *Madden*, 15 F. Supp. 407 (N. D. Okla.), reversed, 90 F. (2d) 321 (C. C. A. 10).

which has not been decided by this Court and there is a conflict of decisions. For the foregoing reasons we join the petitioners in requesting that a writ of certiorari issue.

Respectfully submitted.

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SEPTEMBER 1944.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

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(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new find-

ings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and

shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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